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No. 89-729

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

TOM ABBOTT, et al.,
Petitioners

v.

THE CITY OF VIRGINIA BEACH,
Respondent.

**BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT**

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QUESTION PRESENTED BY PETITIONERS FOR REVIEW

Petitioners argue that Respondent, City of Virginia Beach (hereinafter referred to as "the City") violated the Fair Labor Standards Act, 29 U.S.C. § 201, et seq. (hereinafter referred to as "FLSA" or "the Act"), specifically 29 U.S.C. § 207(o)(2)(A)(i), by making compensatory time available in lieu of paid overtime for overtime hours worked absent an agreement with the designated representative(s) of its employees.

The City submits that it was, and is, prohibited by the law of Virginia from entering into an agreement such as the agreement contemplated by § 207(o)(2)(A)(i) with any representative of its employees, and that, by making compensatory time available in lieu of paid overtime for overtime hours worked, at the discretion of the individual police officer, and absent an agreement with the police officers' designated representative, it was not in violation of § 207(o)(2)(A)(i).

The question presented by Petitioners for review is whether or not the provisions of § 207(o)(2)(A)(i) require a public employer to enter into an agreement with its employees' designated representative(s) notwithstanding the fact that state law prohibits public employers from entering into such agreements.

STATEMENT OF THE CASE

On February 19, 1985, this Court, in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), held that the provisions of the Fair Labor Standards Act apply to the public sector. The immediate impact of the decision was to invalidate many of the existing statutes, ordinances, policies, practices, and procedures of state and local governments concerning the wages and hours of their employees. A major impact of Garcia was that its application to the public sector invalidated the widespread use of compensatory time off in lieu of paid overtime for overtime hours worked and, therefore, presented severe financial implications for many localities

that had relied on compensatory time to offset otherwise prohibitive overtime expenditures.

In response to the public sector concerns, Congress enacted the Fair Labor Standards Amendments of 1985 (Pub.L. 99-150) (hereinafter referred to as "Amendments") which, inter alia, provide for the use of compensatory time in lieu of paid overtime in accordance with certain conditions. The Amendments were the result of numerous discussions, debates, negotiations, and agreements among many interested employer and employee groups. In commenting on the need for the Amendments, the Senate Committee on Labor and Human Resources stated that

> the financial costs of coming into compliance with the FLSA -- particularly the overtime provisions of section 7 -- are a matter of grave concern to many states and localities. We have received extensive testimony on this subject from representatives of state and local governments and organized labor. Although the testimony reflects sharp disagreements as to the nature and context of FLSA compliance costs, the Committee concludes that states and localities required to comply with the FLSA will be forced to assume additional

financial responsibilities which in at least some instances could be substantial.

S.Rep. 159, 99th Cong., 1st Sess. 8 (1985).

The 1985 Amendments served the purpose of addressing and alleviating many of the concerns of both government and labor groups and representatives.

The amendment at issue before this Court states, in part, that

> (1) Employees of a public agency which is State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

29 U.S.C. § 207(o)(1).

Petitioners allege that the City of Virginia Beach violated § 207(o)(2)(A) which states that

> (2) A public agency may provide compensatory time under paragraph (1) only –
>
> (A) pursuant to –
>
> (i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the

> public agency and representatives of such employees; or
>
> (ii) in the case of employees not covered by subclause (i), an agreement or under- standing arrived at between the employer and the employee before the performance of the work ....

On April 10, 1986, Petitioner, Officer Frank LaPorta, President of the Policemen's Benevolent Association, IBPO 525, sent a letter to Mr. Thomas H. Muehlenbeck, then City Manager of the City of Virginia Beach, calling the City Manager's attention to 29 U.S.C. § 207(o)(2)(A)(i), advising him that he was the designated representative of certain police officers for purposes of the Act, and demanding that the City meet with him prior to the City's institution of "a complimentary [sic] time policy." The City declined to meet with Officer LaPorta advising him that State law prohibited the City from negotiating and entering into an agreement with any representative of public employees. The City's refusal to meet with Officer LaPorta was not a contrived decision arrived at in response to his April 10, 1986 demand for recognition, but was a decision based

on an interpretation of State law regarding union/ employee representation of public employees; a decision that was consistent with the City's historical position regarding public employee representation in light of the State prohibition. The City presently maintains, and maintained prior to the 1985 Amendments to the FLSA, that the legislature of Virginia prohibits the recognition of representatives of public employees.

Based on the 1985 Amendments and on the aforementioned legislative prohibition, the City adopted an Overtime Policy that provided for the use of compensatory time in lieu of paid overtime at the discretion of department heads or designees. However, that discretion was not exercised, and Petitioners and other police officers were permitted to voluntarily choose either compensatory time or cash for overtime hours worked. The City argues that since it was not authorized under State law to comply with § 207(o)(2)(A)(i), § 207(o)(2)(A)(ii) is controlling and, therefore, its Overtime Policy was in compliance therewith.

ARGUMENTS FOR DENYING PETITION

I. THE DECISIONS OF THE COURTS OF APPEALS FOR THE FOURTH AND ELEVENTH CIRCUITS ARE NOT IN CONFLICT, AND REPRESENT A CLEAR AND CONCISE INTERPRETATION OF THE STATUTE IN QUESTION

II. BY FAILING TO CONSIDER THE COMMENTS OF THE DEPARTMENT OF LABOR, THE DECISION OF THE COURT OF APPEALS FOR THE TENTH CIRCUIT IS CLEARLY ERRONEOUS

ARGUMENT I.

THE DECISIONS OF THE COURTS OF APPEALS FOR THE FOURTH AND ELEVENTH CIRCUITS ARE NOT IN CONFLICT, AND REPRESENT A CLEAR AND CONCISE INTERPRETATION OF THE STATUTE IN QUESTION

"The statute's language makes clear that less formal or binding arrangements than collective bargaining agreements are fully sufficient for § 207(o)(2)(A)(i) purposes." Brief of Petitioners at 14. That "axiom" weaves a common thread throughout Petitioners' argument. The type of agreement that will satisfy the provisions of § 207(o)(2)(A)(i), however, is not an issue. The issue is whether or not the statute requires a public

employer to enter into an agreement with the representative of its employees prior to awarding compensatory time, irrespective of the form the agreement may take, notwithstanding the fact that state law prohibits the employer from entering into such agreements.

Petitioners have misinterpreted the decision of the Fourth Circuit in Abbott v. City of Virginia Beach, 879 F.2d 132 (4th Cir. 1989). "According to the Fourth Circuit, § 207(o)(2)(A)(i) only applies where state law permits employees of state and local governmental entities to have recognized representatives for purposes of collective bargaining." Brief of Petitioners at 13-14. (Emphasis added.) "For purposes of collective bargaining" is language added by Petitioners. The decision of the Fourth Circuit was not as narrow as Petitioners would suggest.

The Fourth Circuit stated that "the question here is whether section 207(o) permits public employers to enter into individual agreements with its employees to provide compensatory time in lieu of money for overtime where

state law prohibits the employer from entering into agreements with employee representatives," and concluded that "the district court properly interpreted the statute as allowing public employers to enter into individual overtime compensation agreements with individual employees where state law prohibits the agency from entering into agreements with employee representatives." 879 F.2d at 135.

The Fourth Circuit did not conclude that the representative chosen by the employees for purposes of the Act had to be a collective bargaining agent. The Fourth Circuit merely concluded that, regardless of the method by which the employees' representative is designated, if state law prohibits a public employer from "entering into agreements with employee representatives," § 207(o)(2)(A)(i) is not applicable.

The Eleventh Circuit in Dillard v. Harris, 885 F.2d 1549 (11th Cir. 1989), agreed with the Fourth Circuit's analysis.

> The legal issue turns on whether the pay is governed by a collective agreement or an individual agreement, and not on the procedures by which the agreement is made.

. . .

> If the mere designation of a representative with whom the agency could not legally make an agreement should be sufficient to control the method of compensation, it would have been simple for the statute to plainly so provide.

885 F.2d at 1556.

The Eleventh Circuit adopted the Fourth Circuit's analysis, but went on to provide "an alternative approach that reaches the same result." Id. at 1550. The Fourth Circuit concluded that § 207(o) was ambiguous and that, therefore, resort to the legislative history was appropriate.

> In construing section 207(o), the principal function of the court is to effectuate congressional intent. This is a difficult task since the statute does not define the term "representatives," legislative history is contradictory, and administrative commentary is confusing.

879 F.2d at 135.

Although the "alternative approach" taken by the Eleventh Circuit concluded that the language of § 207(o) was unambiguous, the court looked to the legislative and regulatory history behind the statute to confirm its

conclusion. And, in doing so, it reached the same conclusion as the Fourth Circuit.

Both the Fourth and Eleventh Circuits first reviewed the House and Senate Committee Reports for an expression of congressional intent. The Fourth Circuit concluded that the reports were also ambiguous, and therefore determined that resort to the regulatory history was necessary. The Eleventh Circuit concluded that "although there are unclear and conflicting statements in the legislative history, this Court will not read into the statute a requirement not included in its plain language or clearly expressed in its history." 885 F.2d at 1554.

The Fourth and Eleventh Circuits then resorted to the administrative regulations promulgated to effectuate the 1985 Amendments to the Act; the Fourth Circuit to clarify the ambiguity in the statute, the Eleventh Circuit to confirm that the regulations were not contrary to an unambiguous statute. See, 29 C.F.R. Part 553 (1988).

The pertinent provisions of the administrative regulations state:

> Where employees have a representative, the agreement or understanding concerning the use of compensatory time must be between the representative and the public agency .... In the absence of a collective bargaining agreement applicable to the employees, the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees.

29 C.F.R. § 553.23(b)(1)

Petitioners have relied on § 553.23(b)(1) to conclude that any perceived ambiguity in the statute is cured by the regulations. But the ambiguity of § 207(o) is on two levels. First, the term "representative" is not clearly defined. And second, the statute does not clearly indicate the intent of Congress to preempt the law of those states that prohibit public employers from entering into agreements with representative(s) of public employees.

Although the Fourth and Eleventh Circuits travel different courses in the maze, both Circuits reach the same destination – the type of agreement that will satisfy the provisions of § 207(o)(2)(A)(i) is not an issue. The issue is whether or not the statute mandates a public employer to enter into an agreement with a representative

of its employees as a condition precedent to awarding compensatory time off in lieu of paid overtime for overtime hours worked. The Fourth and Eleventh Circuits concede that any type of agreement is acceptable, assuming, of course, that the employer is authorized by state law to enter into the agreement.

The state laws of Virginia and Georgia prohibit a public employer from entering into an agreement with the representative of its employees. The prevailing issue, therefore, is whether or not Congress, by enactment of § 207(o)(2)(A)(i), intended to preempt state law in that regard.

Preemption is not evident from the statute, it is not evident from the legislative history and, it is not evident from the regulations. The issue of intent to preempt is, however, addressed in the sole remaining source available to facilitate statutory interpretation -- the administrative (regulatory) history. In reaching their respective decisions, the Fourth and Eleventh Circuits were persuaded by the Discussion of Major Comments, published in concert with

the final regulations. Application of the Fair Labor Standards Act to Employees of State and Local Governments, 52 Fed.Reg. 2012 (1987). They were particularly persuaded by the comments of the Department of Labor (DOL). The DOL, is addressing the issue of preemption stated that

> The Department recognizes a wide variety of State law that may be pertinent in this area. It is the Department's intention that the question of whether employees have a representative for purposes of FLSA section [207(o)] shall be determined in accordance with State or local law and practices.

Id. at 2014-15, cited in 879 F.2d at 136; 885 F.2d at 1556.

The persuasive effect of the Department's comments is evident in the following conclusion of the Fourth Circuit.

> While the Secretary [of Labor] followed the House position that an agreement must be reached between an employer and a representative of the employees where a representative has been designated -- whether recognized or not -- he also expressed intent not to preempt state law.
>
> . . .
>
> Beneath the conflicting and confusing rhetoric of the administrative and legislative history, several matters are clear. The Secretary expressly declined to preempt state laws regarding labor

> relations between public employers and employees.

879 F.2d at 136.

And, the same persuasive effect is equally evident in the following pronouncement of the Eleventh Circuit.

> Under Georgia law, the employees have no representative able to bargain over compensatory time. Accordingly, when DOL adopted 29 C.F.R. § 553.23, it did not intend for the regulation to have the impact of ignoring state law.

885 F.2d at 1556.

In the final analysis, the fundamental conclusions of the Fourth and Eleventh Circuits are logical and harmonious. Therefore, review by this Court of the clear and concise interpretation of the statute by two Circuits is, in the opinion of Respondent, unnecessary.

ARGUMENT II.

BY FAILING TO CONSIDER THE COMMENTS OF THE DEPARTMENT OF LABOR, THE DECISION OF THE COURT OF APPEALS FOR THE TENTH CIRCUIT IS CLEARLY ERRONEOUS

The Tenth Circuit in Local 2203 v. West Adams County Fire Protection District, 877 F.2d 814 (11th Cir. 1989),

reached a decision contrary to the decisions of the Fourth and Eleventh Circuits. However, its analysis was similar to the analyses of the Fourth and Eleventh Circuits.

The Tenth Circuit concluded that § 207(o)(2)(A)(i) is applicable whenever employees have designated a representative, whether or not the representative is recognized by the employer. Its analysis turned on the type of agreement that would satisfy the provisions of the statute, concluding that any type of agreement would suffice and that, therefore, if employees have designated a representative -- whether recognized or not -- a public employer cannot award compensatory time off in lieu of paid overtime for overtime hours worked absent an agreement with the employees' representative.

As discussed hereinbefore, the Fourth and Eleventh Circuits concluded that the type of agreement contemplated by § 207(o) was not an issue, and, in fact, conceded that any type of agreement would satisfy the provisions of the statute. Therefore, in that regard, the

decisions of the Tenth, Fourth and Eleventh Circuits are not at variance.

In reaching its decision, the Tenth Circuit determined that § 207(o) is ambiguous, and resorted to the Department of Labor's regulations to resolve the ambiguity. The Fourth and Eleventh Circuits, as noted above, also resorted to the regulations -- the Fourth Circuit to resolve ambiguity, the Eleventh Circuit to confirm what it considered to be an unambiguous statute.

The final analyses in each of the Circuits essentially turned on the issue of preemption. The key distinction between the Tenth Circuit, and the Fourth and Eleventh Circuits, however, is in their approach to that issue.

In Dillard, the County Fire Protection District (hereinafter referred to as the "District"), argued that a construction of § 207(o) "requir[ing] state and local governments to engage in collective bargaining with employee representatives . . . violates the tenth amendment." 877 F.2d at 820. That argument, however, was dismissed by the Tenth Circuit.

Perhaps the Tenth Circuit's final analysis was narrowed as a result of its ability to reach a conclusion by directly addressing the District's argument without the need for further analysis. The key distinction between the decisions of the Tenth Circuit, and the decisions of the Fourth and Eleventh Circuits, therefore, was occasioned by the divergent arguments of the public employers with respect to the issue of preemption, and the manner in which those arguments were addressed.

The District argued that preemption was unconstitutional. Although the constitutionality of preemption was neither argued by the City of Virginia Beach or the State of Georgia, nor addressed by the Fourth or Eleventh Circuits, the opinions of the Fourth and Eleventh Circuits did not question the authority of Congress to preempt state and local law with respect to the issue of employee representation. The City of Virginia Beach and the State of Georgia argued that Congress did not intend for the Amendments, specifically § 207(o), to preempt state and local law, and the Fourth and Eleventh Circuits were

persuaded by that argument. The distinction between those two divergent approaches is very important.

By viewing the prevailing issue as "intent to preempt," the Fourth and Eleventh Circuits found it necessary to carry their analyses one step further than the Tenth Circuit, and considered the comments of the Department of Labor. By viewing the prevailing issue as "right to preempt," the Tenth Circuit was able to complete its analysis by going no further than a review of the Department's regulations.

The Tenth Circuit's failure to consider the comments may have resulted from oversight, or from a conscious decision to ignore them based on a determination that they provided little or no insight to its analysis. In either event, failure to consider the comments resulted in a fatally flawed analysis.

By failing to consider the comments of the Department of Labor, the agency responsible for promulgating the administrative regulations designed to assist in the interpretation of the Amendments, the Tenth Circuit's

analysis fell short of being complete. And, by falling short of being complete, its analysis, and consequently, its final decision, are clearly erroneous.

The Fourth and Eleventh Circuits completed the puzzle by adding the final piece, i.e., the Department of Labor's comments. The regulations alone do not completely clarify ambiguity in the statue. The regulations merely clarify ambiguity with respect of the issue of the type of representative or agreement contemplated by the statute. And, on that issue, there is no dispute. The Tenth, Fourth and Eleventh Circuits conclude that any designated representative, and any agreement, will satisfy the provisions of the statute. The issue begging for resolution is whether Congress intended to preempt state and local law; the issue is not whether Congress has the right to do so. And, only the comments resolve that issue.

Based on the foregoing, the City of Virginia Beach submits that although there is a conflict between the decision of the Tenth Circuit, and the decisions of the

Fourth and Eleventh Circuits, the decisions of the Fourth and Eleventh Circuits represent clear, concise and complete interpretations of § 207(o)(2)(A)(i), the decision of the Tenth Circuit is clearly erroneous, and, therefore, review by this Court is neither necessary nor required.

Respectfully Submitted,

By _____
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CERTIFICATE

I hereby certify that I mailed two true copies of the above on this 15th day of December, 1989, to counsel of record, Michael T. Liebig, Esq., 1025 Connecticut Ave., N.W., Suite 307, Washington, D.C. 20006.

_____